

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARGARET ANDRES,

Defendant-Appellant.

UNPUBLISHED
February 23, 2006

No. 258280
Wayne Circuit Court
LC No. 04-007203

Before: Borrello, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order quashing the information against defendant. We affirm. This appeal is being decided without oral argument in accordance with MCR 7.214(E).

The police were dispatched to a gas station in response to a report of an intoxicated person's getting into a van and attempting to drive it. The police found defendant, in the parking lot, in a white minivan that was facing a bar. Defendant smelled of intoxicants, had bloodshot eyes, spoke in a manner that was difficult to understand, failed field sobriety tests, and eventually tested for a blood alcohol level of 0.26.¹ The van's keys were in the ignition, and the transmission was in drive, but the engine was not running, and the vehicle never moved. The police additionally observed an open pint bottle of whiskey within the vehicle.

Defendant was charged with operating a motor vehicle while intoxicated, third offense, MCL 257.625(1), and having an open container of alcohol in a moving vehicle, MCL 257.624a. The district court concluded that the evidence that defendant, while intoxicated, had engaged the ignition and put the vehicle into gear, warranted binding her over for trial. The circuit court dismissed both charges, however, on the ground that defendant's conduct did not satisfy the statutory definition of operating a vehicle. On appeal, plaintiff presents argument in connection

¹ This is over three times the legal limit of "0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine." MCL 257.625(1)(b).

with the OUIL charge only, thus impliedly abandoning objections to the dismissal of the open-container charge.²

In reviewing a district court's decision whether to bind a defendant over for trial, the circuit court examines the entire record of the preliminary examination to determine whether the district court's decision constituted an abuse of discretion; in turn, we review de novo the circuit court's determination whether the district court abused its discretion. *People v Green*, 260 Mich App 392, 401; 677 NW2d 363 (2004). A court "by definition abuses its discretion when it makes an error of law." *Koon v United States*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996). See also *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

MCL 257.625(1)(b) prohibits intoxicated persons from operating a motor vehicle "upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles" At issue here is not defendant's state of intoxication, but whether she was operating a motor vehicle.

For this purpose, "operating" is defined "in terms of the danger the OUIL statute seeks to prevent: the collision of a vehicle being operated by a person under the influence of intoxicating liquor with other persons or property." *People v Wood*, 450 Mich 399, 404; 538 NW2d 351 (1995). Accordingly, "[o]nce a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk." *Id.* at 404-405.

In this case, the evidence indicated that defendant, while intoxicated, put the vehicle neither in motion, nor in a position posing a significant risk of causing a collision. Instead, the evidence indicates that, despite her attempts, defendant failed to "put" the vehicle into any condition, upon returning to it intoxicated. Instead, the vehicle remained parked, as it was before defendant tried to operate it. There is no suggestion that the vehicle was parked on a steep incline, such that putting it into gear but with the engine off might cause it to roll dangerously. No exertion on defendant's part was required to keep the vehicle from moving, but additional exertions would have been required to make it move.

Plaintiff relies on *People v Stephen*, 262 Mich App 213, 215; 685 NW2d 309 (2004), where charges were reinstated against a defendant who was found asleep in his truck, with the engine not running, the transmission in park, and its keys in the defendant's pocket. However, the defendant had confessed to driving himself to that parked position while intoxicated. *Id.* This Court concluded not that the defendant, as found, was operating his truck, but rather that his confession, along with the circumstantial evidence, indicated that he had actually driven the vehicle some distance while intoxicated. *Id.* at 219-220. In this case, in the absence of any

² MCL 257.624a(1) prohibits open liquor containers "within the passenger compartment of a vehicle upon a highway, or within the passenger compartment of a moving vehicle in any place open to the general public or generally accessible to motor vehicles" In this case, there was no evidence that defendant's vehicle was "upon a highway" or "moving."

evidence that defendant had actually driven any distance while intoxicated, plaintiff seeks to prosecute her on the theory that she was operating the vehicle as the police found her.

But because the evidence indicates that defendant in fact entered a vehicle while it posed no significant risk of collision, and failed to change that state of repose despite turning the keys and maneuvering the gear shift, she did not satisfy the definition of “operating” for purposes of the OUIL statute. *Wood, supra* at 404. Because defendant did not in fact operate her vehicle while intoxicated, the circuit court properly quashed the information.

Affirmed.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald